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9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA

11 SAN FRANCISCO DIVISION

12 WAYMO LLC,

13 Plaintiff,

14 vs.

15 UBER TECHNOLOGIES, INC.;
16 OTTOMOTTO LLC; OTTO TRUCKING
LLC,

17 Defendants.

CASE NO. 3:17-cv-00939

**PLAINTIFF WAYMO LLC'S OFFER OF
PROOF REGARDING ADMISSIBILITY
OF CERTAIN MARKET AND
FINANCIAL INFORMATION**

**PUBLIC REDACTED VERSION OF
DOCUMENT SOUGHT TO BE SEALED**

Trial Date: December 4, 2017

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1 **I. INTRODUCTION**

2 Waymo submits this offer of proof in advance of (i) eliciting testimony from Uber and
3 Waymo trial witnesses regarding the perceived size of the potential market for autonomous
4 vehicles at the time of the misappropriation, and (ii) introducing into evidence the revenue and
5 profit forecasts contained in Waymo’s baseline profit and loss statement.¹

6 Evidence of the perceived size of the potential market for autonomous vehicles is relevant
7 to this case by Uber’s and Ottomotto’s own admission. For purposes of this case, Uber and
8 Ottomotto (collectively, “Uber”) retained a Ph.D. economist (Dr. Michael Jacobs) as an expert on
9 mergers and acquisitions (M&A) issues to testify about Uber’s acquisition of Ottomotto. In setting
10 out his opinions, Dr. Jacobs recounted various “[f]orecasts of the autonomous vehicle business,”
11 including a May 2014 estimate of \$87 billion by 2030, an April 2015 estimate of \$102 billion by
12 2030, a January 2016 estimate of \$1.5 trillion by 2040, a July 2016 estimate of \$41.7 billion by
13 2025, and a March 2017 estimate of \$22 to \$26 billion by 2025. (Ex. 1 [Jacobs Report], ¶ 27.) He
14 concluded that “the perceived size of the potential market has grown over time” and that this “has
15 several implications for transaction economics in the 2016 time frame.” (*Id.* ¶¶ 27, 29.) He went
16 on to explain that these “substantial forecasts” – along with the fact that “strategic
17 players...needed to have development done” and the fact that there was “a small group of
18 experienced engineers” – “created the economics that we see in the transactions in the
19 [autonomous vehicle] marketplace.” (*Id.* ¶ 29.) Uber’s expert says that these “economics” explain
20 why Uber placed such a high value on Ottomotto – which had been in existence for less than two
21 months when the term sheet was signed) – in early 2016. The very same economics explain why
22 Uber would place a high value on a trade secret license in a hypothetical negotiation with Waymo
23 in the very same time frame. This is especially true where, as here, Uber executives were
24 convinced that Uber could not survive if it was not among the first to commercialize self-driving
25 technology in TaaS (transportation as a service) and where, as here, the trade secrets to be licensed

26 _____
27 ¹ Waymo intends to introduce at trial some portions of its baseline P&L statement –
28 including, for example, those portions that reflect Waymo’s launch and scaling plans – through
normal procedures. The instant offer of proof is provided solely with respect to the admission of
Waymo’s future revenue and profit forecasts, which are also contained in the same baseline P&L.

1 relate to LiDAR technology, which Uber believed to be the [REDACTED] of its own lagging
2 development efforts.

3 The revenue and profit forecasts contained in Waymo's baseline profit and loss statement
4 are also relevant to the hypothetical negotiation. In his analysis of "transaction economics in the
5 2016 time frame" to justify the high value Uber placed on Ottomotto (*id.* ¶ 29), Uber's and
6 Ottomotto's own expert thought it important that "Morgan Stanley has estimated that Waymo is
7 currently worth \$70 billion just based on its intention to use its driverless cars to obtain a fraction
8 of the ride marketplace" (*id.* ¶ 27). Though Waymo does not seek to rely on Morgan Stanley's
9 valuation, it should be permitted to rely on its own forecasts [REDACTED] (Ex.
10 8 [TX-4980]) as evidence of the "economics" that would similarly impact a negotiation between
11 Uber and Waymo for a trade secret license. Like Uber, Waymo viewed the autonomous vehicle
12 market as "winner take all" or "winner take most." (Ex. 2 [TX-1031]; Ex. 3 [TX-1033].) Thus all
13 or most of Waymo's forecasted profits were viewed as contingent on Waymo using its technical
14 lead to become the first and best at offering self-driving TaaS. Waymo's projections – and the
15 effect a shrinking technical lead would have on those projections – would have been front and
16 center for Waymo at any hypothetical negotiation with a competitor like Uber for a license to
17 Waymo trade secrets. And again, this is especially true where, as here, the trade secrets to be
18 licensed relate to the very area of technology that Uber believed to be the [REDACTED] of its
19 development efforts and thus most likely to impact Uber's overall self-driving timeline.

20 **II. OFFER OF PROOF**

21 By 2016, both Uber and Waymo believed that ride-sharing fleets would become [REDACTED]
22 [REDACTED] in our lifetimes, making the commercialization of self-driving technology a
23 massive market opportunity. Both Uber and Waymo also believed that time-to-market was of
24 critical importance because the market opportunity was likely to be winner-take-all or winner-
25 take-most. Waymo believed that its ability to capitalize on this opportunity hinged in large part on
26 its technical lead and its resulting ability to enter the market first and as long before the next
27 entrant as possible. Indeed, this drove Waymo's projections of market share and revenues.
28 Similarly, Uber believed that Waymo's technical lead was an existential threat and that it had to

1 close the gap with Waymo or risk losing its large share of the TaaS market. For the same reasons
 2 that Uber has contended that the huge amount of money in play – as evidenced by various
 3 valuations of overall market potential and of Waymo – explains why Uber highly valued a two-
 4 month old company like Ottomotto, the same evidence would have an effect on a negotiation
 5 between competitors for a license to LiDAR-related trade secrets.

6 **A. At the time of the misappropriation, Waymo believed that the first player to**
 7 **commercialize self-driving cars was likely to capture all or most of the TaaS**
 8 **market.**

9 1) The evidence at trial will show that Waymo was the first to heavily invest in the
 10 development of self-driving technology and that Waymo was the first to understand that the
 11 technology could be safely commercialized in the near term rather than decades from now. And,
 12 from a business perspective, Waymo has always understood that its technical lead would be key to
 13 its success in whatever market(s) it chose to enter.

14 2) By 2016, Waymo had decided that its business strategy should prioritize
 15 commercialization of self-driving technology for TaaS (over other applications like trucking or
 16 personal car ownership). Waymo understood the potential size of the autonomous TaaS market.
 17 And Waymo understood that its technical lead would drive its success in that market, especially
 18 vis-à-vis established manned TaaS players like Uber.

19 3) Waymo will introduce evidence to show that, by 2016, it was operating under the
 20 premise that the first company to achieve self-driving TaaS at scale was likely to win a majority of
 21 the market in any given region. (Ex. 2 [TX-1031] (noting that a “single player (in any region) will
 22 likely earn majority of profits in TaaS”); Ex. 3 [TX-1033] (discussing assumption that AV-based
 23 TaaS market is “most likely a winner take most”).

24 4) The evidence at trial will also show that, as of 2016, Waymo believed that it had a
 25 two to five year technical advantage over its self-driving competitors. Waymo believed this lead
 26 would allow Waymo to launch and scale a self-driving TaaS service before another competitor
 27 with an existing TaaS service (like Uber) could develop self-driving technology and deploy it
 28 within its existing network. (*See* Ex. 3 [TX-1033] (discussing Waymo’s technology lead and
 various strategy implications depending on the size of Waymo’s lead).) Indeed, the evidence will

1 show that Waymo's emphasis on obtaining as much of a lead as possible – while ensuring safety
 2 and operating within other constraints – had come to inform nearly every aspect of its business
 3 plan by 2016.

4 **B. At the time of the misappropriation, Uber also believed that it needed to be**
 5 **among the first to commercialize self-driving technology and that it needed to**
 6 **accelerate its development efforts.**

7 5) The evidence at trial will show that, by 2016, Travis Kalanick, Uber's then-CEO,
 8 had become convinced that being among the first to commercialize self-driving for TaaS was
 9 "existential" for Uber. Mr. Kalanick has stated that: "[REDACTED]"
 10 "[REDACTED]." (Ex. 4 [TX-387].) Mr. Kalanick has stated that
 11 succeeding in self-driving is "[REDACTED]" and "[REDACTED]"
 12 "[REDACTED]." (Ex. 5 [TX-5472].)

13 6) The evidence at trial will show that this view permeated Uber. For example, in an
 14 email regarding "[REDACTED]" and noting a "[REDACTED]" Jeff Holden –
 15 Uber's Chief Product Officer – stated: "[REDACTED]"
 16 (Ex. 6 [TX-4481].) John Bares, former director of Uber's ATG program in Pittsburgh, has also
 17 agreed that "[REDACTED]." (Ex. 7 [Bares 6/16/27
 18 Depo. Tr.] at 122:14-16.)

19 7) The evidence at trial will show that Uber understood it was lagging behind Waymo
 20 in the development of self-driving technology and that it needed to close the gap. Mr. Kalanick
 21 has said: "[REDACTED]"
 22 "[REDACTED]"
 23 "[REDACTED]." (Ex. 8 [TX-291].) Cameron Poetzsch, Uber's Vice President of
 24 Corporate Development, has explained: "[REDACTED]"
 25 "[REDACTED]"
 26 "[REDACTED]" (Ex. 9
 27 [Poetzsch 8/11/17 Depo. Tr.] at 464:16-20.) Mr. Poetzsch has testified: "[REDACTED]"
 28 "[REDACTED]"

1 [REDACTED].” (*Id.* at 465:5-14.)

2 C. **Both Waymo And Uber Perceived That They Were Competing For All Or**
 3 **Most Of A Significant Market And That Perception Influenced Their**
 4 **Behavior**

5 8) Uber and Ottomotto have offered an expert opinion regarding the perceived growth
 6 of the self-driving industry in order to justify Uber’s high valuation of Ottomotto, a company that
 7 existed for less than two months at the time Uber was assessing its value and negotiating to
 8 acquire it. Their M&A expert, Dr. Michael Jacobs, opined that “dramatic growth is possible over
 9 the next ten to fifteen years” in the autonomous vehicle industry. (Ex. 1 [Jacobs Report], ¶ 27.)
 10 He recounted various “[f]orecasts of the autonomous vehicle business,” enumerating a May 2014
 11 estimate of \$87 billion by 2030, an April 2015 estimate of \$102 billion by 2030, a January 2016
 12 estimate of \$1.5 trillion by 2040, a July 2016 estimate of \$41.7 billion by 2025, and a March 2017
 13 estimate of \$22 to \$26 billion by 2025. (*Id.* ¶ 27.)

14 9) According to Dr. Jacobs, “the perceived size of the potential market has grown over
 15 time,” which motivated Uber to avoid being “left out” and to place great value on the opportunity
 16 to acquire Ottomotto. (*Id.* ¶ 29.)

17 10) The evidence at trial will show that the perceived size of the market opportunity
 18 was an important consideration for Uber, and one that animated Uber’s conduct in many respects,
 19 including vis-à-vis Waymo, its most significant rival in self-driving. Indeed, the evidence will
 20 show that the perceived size of the market opportunity – combined with the common belief that
 21 the market would play out as “winner take all” or “winner take most” – explains why Mr.
 22 Kalanick was intent on accelerating Uber’s development of self-driving technology at all costs and
 23 why at least some at Uber valued the acceleration of its development timeline at many millions of
 24 dollars per day. (Ex. 10 [TX-299]; Ex. 11 [McClendon 8/1/17 Depo. Tr.] at 179:17-180:17
 25 (explaining that Kalanick “[REDACTED]”
 26 [REDACTED]”).)

27 11) The evidence at trial will show that Waymo also acted in light of the large market
 28 opportunity. Waymo’s current Plan of Record document discusses the need to “[REDACTED]

1 [REDACTED]” and “[REDACTED]” (Ex. 12 [TX-1147], at 5). This
 2 strategy is in line with Waymo’s belief that the first company to achieve self-driving TaaS at scale
 3 was likely to win a majority of the market in any given region. (Ex. 2 [TX-1031] (noting that a
 4 “single player (in any region) will likely earn majority of profits in TaaS”); Ex. 3 [TX-1033]
 5 (discussing assumption that AV-based TaaS market is “most likely a winner take most”).

6 **D. Uber understood that accelerating its LiDAR development would accelerate its**
 7 **overall self-driving timeline.**

8 12) By 2016, Uber recognized that LiDAR technology specifically was a key driver of
 9 its ability to succeed with self-driving technology. (Ex. 13 [TX-910] ([REDACTED]
 10 [REDACTED]); Ex. 14 [TX-171] ([REDACTED]
 11 [REDACTED]); Ex. 15 [TX-678] (“[REDACTED]”);
 12 (Ex. 16 [TX-367] (Kalanick: [REDACTED]
 13 [REDACTED]).)

14 13) The evidence at trial will show that lasers were the “longest pole” with respect to
 15 Uber’s own self-driving technology development efforts. (Ex. 16 [TX-367] (discussing Mr.
 16 Levandowski, [REDACTED]; *id.*
 17 (discussing the [REDACTED]).) As Mr. Kalanick has explained, [REDACTED] refers to the
 18 hardest problem Uber had to solve: “[REDACTED]
 19 [REDACTED].” (Ex. 17 [Kalanick 7/27/17 Depo. Tr.] at 198:1-199:2.) Indeed,
 20 the evidence will show that Uber believed that [REDACTED]
 21 [REDACTED]. (Ex. 18 [TX-
 22 170] (discussing Levandowski’s potential value-add, John Bares wrote, [REDACTED]
 23 [REDACTED]
 24 [REDACTED]).)

25 **III. THE PROFFERED TESTIMONY AND EVIDENCE SHOULD BE ADMITTED**

26 **A. Evidence Of The Perceived Size Of The Market Opportunity For Self-Driving**
 27 **Is Admissible To Prove Uber’s Motive For Misappropriating Waymo’s Trade**
 28

1 **Secrets**

2 As demonstrated above, by 2016, Uber had come to understand (i) the size of the potential
3 market opportunity associated with self-driving technology and (ii) that, to capture the "winner
4 take all" or "winner take most" self-driving TaaS market, it needed to narrow the technical lead
5 that Waymo had over Uber. This dual understanding motivated Uber's "[REDACTED]" when it
6 came to self-driving, including its misappropriation of Waymo's secrets. (Ex. 11 [McClendon
7 8/1/17 Depo. Tr.] at 179:17-180:17.) Waymo should be permitted to explain to the jury
8 exactly what Uber understood to be on the line at the time of the misappropriation. *See LinkCo,*
9 *Inc. v. Fujitsu*, 232 F. Supp. 2d 182 n.9 (S.D.N.Y. 2002) (admitting sales projections "for the
10 limited purpose of explaining Fujitsu's motive to engage in the alleged [trade secret
11 misappropriation]"). For this reason alone, Waymo should be able to elicit testimony regarding
12 the perceived size of the market opportunity for self-driving.

13 **B. Evidence Of The Perceived Size Of The Market Opportunity For Self-Driving**
14 **And Evidence Of Waymo's Revenue And Profit Forecasts Are Admissible To**
15 **Establish Trade Secret Status**

16 In order to prevail on its trade secret misappropriation claim, Waymo must establish that
17 its asserted trade secrets derive actual or potential independent economic value from not being
18 generally known. *MAI Sys. Corp. v. Peak Comp. Inc.*, 991 F.2d 511, 520-21 (9th Cir. 1993). The
19 "long-term lucrative potential" of a field is circumstantial evidence that "incremental
20 advancements" in that field derive economic value from not being known. *Altavion, Inc. v.*
21 *Konica Minolta Sys. Lab. Inc.*, 226 Cal. App. 4th 26, 65 (2014) (upholding a finding of substantial
22 economic value based on evidence that "if successfully implemented, DST could be very lucrative
23 because of potential applications in many different industries" and testimony that "the technology
24 had the potential to earn vast sums on check scanning in the banking industry"). Here, Waymo's
25 trade secrets are valuable in large part because of their specific development in the context of self-
26 driving technology. Waymo should be permitted to establish the "long-term lucrative potential"
27 of that technology in connection with meeting its burden of proving that its confidential technical
28 information is properly afforded trade secret status. For this reason as well, testimony regarding
the general perception of the market opportunity for self-driving and evidence of Waymo's

specific assessment of that market opportunity (in the form of its projections) should be admitted at trial.

C. Evidence Of The Perceived Size Of The Market Opportunity For Self-Driving And Evidence Of Waymo's Revenue And Profit Forecasts Are Admissible As Factors That Would Significantly Impact The Hypothetical Negotiation

As demonstrated above, Uber's own view is that both the perceived size of the market opportunity for self-driving and the valuation of Waymo as a self-driving enterprise inform the "transaction economics" at play in the self-driving industry in 2016. Uber makes use of this information to explain why it placed such a high value on the acquisition of Ottomotto. Waymo should be entitled to rely on the same information to explain why Uber would be willing to pay a high royalty for the acquisition of trade secrets from Waymo in the parties' hypothetical negotiation.

Indeed, as outlined above, the evidence at trial will show that both Uber and Waymo believed that the market opportunity for self-driving TaaS was on the order of at least many tens of billions of dollars; that the market would be "winner take all" or "winner take most"; that time to market would be critical (if not determinative of winners and losers); and that Waymo had a two to five year technology lead on Uber, while Uber already had an established TaaS business. Regardless of starting point (Uber's valuation of accelerated development, Uber's valuation of Ottomotto, Waymo's research and development costs, etc.), this specific constellation of factors would drive up the royalty that Uber would pay (and Waymo would demand) for a license to Waymo trade secrets related to the very technological area (LiDAR) that Uber considered to be the ████████ of its own development efforts. The evidence at trial will show that the size of this winner-take-all (or most) market opportunity was front and center every step of the way for Uber, and it would have been front and center for both Uber and Waymo during their hypothetical negotiation. Accordingly, Waymo should be permitted to elicit testimony regarding the parties' perceptions of the market opportunity and should be permitted to introduce documentary evidence of its projected revenues and forecasts.

IV. CONCLUSION

For the foregoing reasons, the Court should allow Waymo to (i) elicit testimony from Uber

1 and Waymo trial witnesses regarding the perceived size of the potential market for autonomous
2 vehicles at the time of the misappropriation, and (ii) introduce into evidence the revenue and profit
3 forecasts contained in Waymo's baseline profit and loss statement.

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